

Force Majeure? Don't be so sure

Sadrill Ghana Operations Limited v Tullow Ghana Limited [2018] EWHC 1640 (Comm)

Background

In a recent high-profile dispute concerning the operation of force majeure ("FM") clauses in offshore charters, the English Court found that an oil company could not avoid liability for its non-performance even though a government authority had prohibited performance, and the contract expressly provided that such government action was a FM event. Does this decision apply with equal force to FPSO charters?

Tullow was the license owner and operator of various subsea oilfields off the coast of Ghana (together, the "Jubilee" fields), including one field close to the border with the Ivory Coast (known as the "TEN" field). Tullow chartered the deep-water drilling rig "West Leo" from Sadrill for well drilling in TEN.

Ghana and the Ivory Coast began arbitration proceedings to resolve a dispute regarding their subsea border (and hence which country owned TEN). As an interim measure, the Arbitration Tribunal ordered Ghana to ensure that no new wells could be drilled in TEN, although wells that had already been drilled could be completed. Ghana complied, effectively banning Tullow from further drilling in TEN.

At the time of the Tribunal's intervention, several wells had been drilled in TEN but required completion and West Leo therefore continued working to complete these. Tullow prepared a drilling schedule which anticipated that upon completing the wells in TEN, the West Leo would be moved to work in other Jubilee fields.

The drilling schedule was part of Tullow's development plan for Jubilee as a whole (the "Plan"), which required approval by Ghana. Tullow expected that the Plan would be approved, but it was refused. The apparent reason was that the bearing of the turret of an FPSO intended for use in the Jubilee fields was found to be damaged in February 2016, with the result that the amount of oil that it could process was significantly limited. The refusal of the Plan meant that it would be significantly

less commercially attractive for Tullow to employ the West Leo in any Jubilee fields.

Once the final TEN well was complete, Tullow declared that a force majeure ("FM") event had taken place, stopped paying hire to Sadrill and then terminated the contract 60 days later. In doing so, Tullow relied on a clause in the contract which allowed termination if a defined FM event lasting more than 60 days, prevented a party from fulfilling any of its obligations under the contract. The specific defined FM event relied upon by Tullow was any "*drilling moratorium imposed by the government*".

The decision

The Court therefore had to decide whether Tullow was entitled to rely on the FM clause. This in turn posed three key questions:

1. Was there an applicable FM event?

The Court found that there was, namely the drilling ban by Ghana.

2. Had the Company been prevented from fulfilling its obligations under the contract?

The Court assumed that Tullow had been prevented from providing Sadrill with a drilling programme, as required under the terms of the contract.

3. The key question: had the applicable FM event caused Tullow's failure to fulfil its contractual obligations?

The Court found that it had not. Although there was one applicable FM event (the drilling ban), there was also a second, non-FM event (the non-approval of the Jubilee Plan by Ghana), which the Court decided was the real cause of Tullow not issuing Sadrill with a drilling programme.

Consequently, Tullow were not entitled to rely on the FM clause and were therefore liable to Sadrill for sums due under the terms of the contract, totalling USD 227.4 million.

Points to consider

The case is a timely reminder as to how causation works in relation to FM clauses, which are of course found in many offshore contracts. It seems likely that many FM clauses would be interpreted in a similar fashion, i.e. if there is a separate (and more causal) non-FM reason why a party does not comply with its obligations (such as, in this case, it simply being less commercially attractive), then that party will not be able to rely on the FM clause, even though there is also a defined FM event in existence.

However, it is worth keeping in mind that the case involved a drilling rig, which could have been used in those other parts of the Jubilee field not affected by the Tribunal's order.

In the context of an FPSO contract it seems much more likely that any Governmental action that prevents either party from performing its obligations under the contract (if the same is a defined FM event) WILL enable the affected party to rely on the FM provisions, because an FPSO is field-specific and not generally free to be used elsewhere (as the "West Leo" was).

Therefore, an FPSO contractor must consider, when asked to agree a definition of FM which includes prohibition by government authorities, or to agree a broad definition of FM that includes any event outside Company's control, whether that is suitable in the context of production from a specified oil-field.



Alex McCue
Senior associate
T: +44 20 7809 2512
E: alex.mccue@shlegal.com

Alex is a senior associate in London specialising in shipping and offshore construction.